IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2007-0073
	)	DEPARTMENT B
	)	
IN RE JOHN V.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. JV200700086

Honorable Ann R. Littrell, Judge

AFFIRMED AS MODIFIED

Edward G. Rheinheimer, Cochise County Attorney
By Roger Contreras — Sierra Vista
Attorneys for State

Mark A. Suagee, Cochise County Public Defender
By Sanford J. Edelman — Sierra Vista
Attorneys for Minor

E S P I N O S A, Judge.

¶1 In April 2007, appellant John V. was charged in a delinquency petition with multiple counts of aggravated assault with a deadly weapon, endangerment, and criminal damage, and one count of criminal trespass. After an adjudication hearing, the juvenile court granted John's motion to dismiss ten of the charges but found he had committed the

remaining offenses as alleged in an amended petition and adjudicated him delinquent. John was placed on supervised probation until his eighteenth birthday. He contends on appeal there was insufficient evidence to support the juvenile court's order adjudicating him delinquent.

¶2 The charges arose out of John's use of a "CO2-powered BB gun" to shoot passing cars and, in one instance, a parked truck and trailer. The victims in the counts John is challenging were the following: Count I, Donald R.; Count VI, Karla D.; Count XV, Andres G.; Count XVI, Eric. A., Andres' passenger; Count XX, Joel R.; and Count XXI, Cynthia M., Joel's passenger. John contends there was insufficient evidence that he had committed assault because, other than Donald, who testified he had been hit with shattered glass, none of the other victims testified that they had sustained "an injury or [had been afraid] of injury or a touching." Thus, John argues, because there was insufficient evidence that he had committed the assaults, *see* A.R.S. § 13-1203, there necessarily was insufficient evidence that he had committed aggravated assault. *See* A.R.S. § 13-1204. John also maintains there was no evidence the BB gun found in his possession was the "deadly weapon" that had been used to shoot at the cars and commit the aggravated assaults; thus, "there was no actual connection between the BB gun . . . and the damage done." He argues there was insufficient evidence that the gun in his possession was operable or that it had been used. And he claims Count XVI was "enhanced," that is, identified as a class two

felony, "without citing or providing any evidence to support the enhancement of that charge."

¶3 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the juvenile court's order adjudicating a minor delinquent. *See In re Natalie Z.*, 214 Ariz. 452, ¶ 2, 153 P.3d 1081, 1083 (App. 2007); *In re P.D.*, 216 Ariz. 336, n.1, 166 P.3d 127, 127 n.1 (App. 2007). Additionally, the court is deemed to have made all factual findings that are necessary to support its judgment. *In re Niky R.*, 203 Ariz. 387, ¶ 21, 55 P.3d 81, 86 (App. 2002). On appeal, "[we] do not reweigh the evidence, but rather only look to determine if there is evidence to sustain the ruling of the judge below." *In re Pima County Juv. Action No. B-10489*, 151 Ariz. 335, 338, 727 P.2d 830, 833 (App. 1986).

¶4 The evidence, which included John's own admissions, established that John and others were randomly shooting at passing cars with a BB gun. The cars were driven by Donald, Karla, Andres, and Joel, each carrying at least one passenger. Through Donald's testimony, inter alia, the state established that Donald and his daughter, who had been his passenger, had been struck with broken glass. Donald testified he and his daughter "were traumatized by the event." That evidence and Donald's testimony that he had been afraid were more than sufficient to establish John had committed aggravated assault as to them.

¶5 We agree with the state that the remaining victims' statements to the Willcox Police Department about what had taken place permitted the court to infer that they, too,

had been afraid because of John's conduct. It was not necessary for the victims to testify that they "had been placed in reasonable apprehension of imminent physical injury, as long as that fact was established by other evidence," including "circumstantial evidence." *State v. Garza*, 196 Ariz. 210, ¶ 4, 994 P.2d 1025, 1026 (App. 1999); *see also State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994). There was sufficient evidence that John, together with his companions, had assaulted the victims as alleged in Counts I, VI, XV, XVI, XX, and XXI of the amended delinquency petition and that the assaults were committed with the use of a CO2-powered BB gun, a deadly weapon. *See generally Herrell v. Sargeant*, 189 Ariz. 627, 944 P.2d 1241 (1997) (CO2-powered BB pistol provided basis for aggravated assault charge; remanded to grand jury for unrelated reasons); *cf. State v. Cordova*, 198 Ariz. 242, ¶ 5, 8 P.3d 1156, 1157 (App. 1999) (pellet gun a deadly weapon for purposes of aggravated assault conviction and establishing dangerous nature of offense).

¶6 We find *State v. Baldenegro*, 188 Ariz. 10, 13-14, 932 P.2d 275, 278-79 (App. 1996), factually distinguishable, just as we did in *Garza*. *See* 196 Ariz. 210, ¶ 5, 994 P.2d at 1026-27. In *Baldenegro*, shots were fired at the car in which the victim was sitting, but he did not see the gun pointed at him or the car; he did not see the "bursts of flame from the driver's side of" the car from which the assailants had been shooting; and there was no evidence this particular victim, unlike another victim, had "reacted to the shooting, either by trying to maneuver to avoid getting shot or by crying out." 188 Ariz. at 13-14, 932 P.2d at 278-79. There, we rejected the state's argument that the victim's "mere presence in a car

at which someone fired shots is sufficient circumstantial evidence of his apprehension or fear." *Id*. at 14, 932 P.2d at 279.

¶7 Here, however, there was ample evidence to establish the victims had been placed "in reasonable apprehension of imminent physical injury." § 12-1203(A)(2). Willcox Police Detective Joe Ferguson testified he had been called after the first shooting, when Donald reported that the rear window of his van had been shattered. Several other reports were made that evening involving other victims. One woman, who appears to have been Karla, went to the police department to report that she had been driving with her three children in the back seat of the car when the rear window "had been shot out," and "you [could] see where the projectile had gone through the window." *See State v. Blaise*, 504 So.2d 1092, 1094 (La. App. 1987) (evidence that victim left scene immediately and contacted police established apprehension).

¶8 Ferguson testified further about two other reports that evening. Joel reported that shots had been fired at the rear window of his small red pickup truck; Joel's girlfriend, the victim in Count XXI, had been a passenger. Detective Rios testified about his contacts with various victims. He went to the home of Andres, the victim in Count XV, whose passenger, Eric, was the subject of Count XVI. The damage to the vehicles and the victims' reports of the events to the officers was direct and circumstantial evidence that supported the juvenile court's finding that the victims had been assaulted. Such evidence distinguishes

this case from *Baldenegro*, where the evidence failed to establish one of the victims had been afraid or at all concerned by the shooting.

¶9 We also reject John's argument that there was insufficient evidence connecting the BB gun found in his possession with the assaults. The evidence permitted the juvenile court to infer John had used that gun to shoot at the cars. The officers' testimony established the kind of damage they had observed had likely been caused by a BB gun, and John admitted "shooting" at cars. When Ferguson approached John and asked if he had been involved in the shootings and whether he had a BB gun, John produced the BB gun from where it was hidden under his shirt in his pants.

¶10 Sergeant Rios testified the damage he saw on two of the cars could not have been caused by slingshot pellets. He also investigated the rooftop from which the shots had been fired and discovered, among other things, BBs and empty boxes for CO2 cartridges. Shoe prints Rios found on the roof matched the shoes John was wearing when he was apprehended, and Rios noted black tar, which he had seen on the roof, on John's hands, clothing, and shoes.

¶11 Finally, given the evidence presented by the state, it was John's burden to support any defense that the BB gun had been inoperable. *See State v. Rosthenhausler*, 147 Ariz. 486, 492, 711 P.2d 625, 631 (App. 1995). He presented no such evidence.

¶12 The state concedes there was no evidence to support a finding that the offense charged in Count XVI, which involved Andres' passenger, Eric, could be anything greater

than a class three felony, *see* § 13-1204(A)(2), (B), although the amended petition alleges that charge as a class two felony. We agree with the state. Therefore, to the extent the court's order adjudicating John delinquent was an implicit finding that John had committed aggravated assault, a class two felony, the order is modified to reflect that the offense is a class three felony. But because we can say with certainty the disposition would have been no different had the offense been correctly classified, *see State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989), we need not remand the matter for a new disposition hearing.

¶13 The juvenile court's order adjudicating John V. delinquent is affirmed as modified herein; the disposition is affirmed as well.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge